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IN THE

SUPREME COURT OF THE UNITED STATES.

Term. No.

HARRY F. GILL,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Harry F. Gill, the above named petitioner, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Third Circuit rendered and entered in this case on February 3, 1953 as amended March 25, 1953.

DECISION AND JUDGMENT OF THE COURT BELOW.

The opinion of the Court below is unreported and appears on page 56 of the Record filed herewith.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on February 3, 1953, as amended March 25, 1953. The jurisdiction of this Court is invoked under the provisions of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51), and the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. A., Sec. 1254).

QUESTIONS PRESENTED.

1. Did not the United States Court of Appeals for the Third Circuit err in reversing the judgment entered by the United States District Court for the Eastern District of Pennsylvania on a verdict for plaintiff, on the sole ground that there was no causal connection between what the Court conceded to be the negligence of the defendant in hiring plaintiff to do the kind of work which he endeavored to avoid by taking a lower seniority rating and correspondingly lower salary because of a disabled knee, and the in-

jury he sustained in the accident, where the Court actually ruled as a matter of law that the plaintiff's contributory negligence was a bar to the accident?

2. Even if plaintiff, in attempting to get out from under the racks due to the pain in his knee, raised up his head sooner than he should have, did not the Court err in holding as a matter of law that defendant's negligence was not a cause in whole or in part of plaintiff's injury despite the jury's verdict to the contrary after an adequate charge by the trial court had left the question of causation to the jury?

3. Does not the decision of the Court of Appeals deny to the plaintiff a right to a jury trial on the question of negligence and causation as guaranteed by the Federal Employers' Liability Act, the Constitution of the United States and the repeated decisions of this Court?

CONSTITUTION AND STATUTE INVOLVED.

The Seventh Amendment to the Constitution of the United States which, in its pertinent parts, provides:

> "In suits at common law * * * the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of common law."

The Federal Employers' Liability Act, 45 U. S. C. A. Sec. 51, provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states, * * *,

shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * *, for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, * * *"

Section 53 of said law in part provides:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee * * *, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: * * *"

NATURE OF CASE AND SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action under the Federal Employers' Liability Act (Title 45 U. S. C. A., Sec. 51 et seq.) brought by the petitioner here, an employee of the defendant. The accident occurred on October 24, 1949. Interstate Commerce was admitted.

Plaintiff, age 63, had been a mechanic for defendant since 1914. On October 3, 1949 he voluntarily took a reduction to helper because of a disabled left knee which had been previously injured and which was operated on in March, 1949 disabling him until August 1, 1949.

On October 24, 1949 plaintiff was ordered by his foreman to assist another employee who was working inside a box car equipped with racks. The racks were approximately

four and one-half feet above the floor level of the car and were designed for holding automotive parts. Plaintiff testified that he had looked into such cars previously but that he had never worked in one. There was no light in the car, except for the natural light coming through the open doors in the center of both sides of the car. Upon entering the plaintiff had to crawl a distance of eight feet under the racks in order to get to the place where the man was working whom he was to help. Plaintiff was given no instructions as to what he was to do. Plaintiff was wearing goggles which diminished his peripheral vision and a cap with a peak because company rules required him to do so. Plaintiff was working on the floor of the car squatting on his right foot with his left leg extended. He could not kneel on his left knee because it would cramp up and hurt. After working for ten minutes in this fashion his left knee became very cramped and not being able to stand up because of the racks above him he began to back out from under the racks toward the center door area which was free of racks. Plaintiff backed out a distance of about eight feet, and when he thought he was clear of the racks he arose and bumped his head against a metal channel of one of the racks. At the time he was still wearing his goggles and cap.

Under these facts, the jury returned a verdict in the sum of $15,000.00. Defendant filed a Motion for Judgment in accordance with its Motion for a Directed Verdict and a Motion for New Trial, both of which motions were denied after plaintiff filed a remittitur, in accordance with the Court's opinion, of one-half the verdict and judgment was entered for plaintiff and against defendant in the amount of $7,500.00.

The Court of Appeals then held that although the defendant was negligent it reversed judgment on the ground that there was no causal connection between defendant's negligence and the plaintiff's injury. Plaintiff's Petition for rehearing was denied. This Petition for Certiorari follows.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The record in this case is replete with evidence that the defendant knowingly sent plaintiff into a box car with racks at either end beyond the center door entrance where plaintiff had to work in a space only four and one-half feet above the level of the floor, with poor lighting and wearing goggles and a cap, according to company rules, and which goggles and cap the jury observed; without instructions as to what he was to do, plaintiff never having worked in such a car before; that plaintiff took a lower seniority rating with lower wages to avoid doing this kind of work, because of a disability in his left knee; and that the plaintiff tried to back out from under the racks, where there was no room to stand, because of a pain in his left knee and in doing so struck his head on the end of a channel bar which he thought he had cleared, all of which the Court of Appeals failed to take into consideration and as to which there could be no question of causation, or at least as to which a clear jury issue was presented. The Court of Appeals in its opinion, is actually by judicial fiat, saying that contributory negligence, which the Federal Employers' Liability Act says only mitigates damages, is a bar to the action. The Court of Appeals refuses to permit inferences to be taken from the evidence. A serious miscarriage of justice would therefore result unless a Writ of Certiorari were granted.

2. Even though the plaintiff testified on direct examination, and we quote from the record, page 14a:

> "Q. For how long a period of time would you say you were working there before something happened?
> "A. Well, I would say about ten minutes.

"Q. Then what happened?
"A. Well I started to back out.
"Q. Why?
"A. Well, on account of my knee.
"Q. What happened to the knee?
"A. Well, the knee was cramped from being in there the way I was, in the position I was in; I started to back out and I thought I was clear of the racks and I raised my head up against the rack."

and on cross-examination said, and I quote from the record, pages 24a-25a:

"A. Well I was trying to get out of the car, and I come out and I thought I was clear of the racks, and I raised my head up and hit my head.
"Q. In other words you mis-judged your position?
"A. Yes."

The Court of Appeals was guilty of patent error in law (1) in holding that no causation had been made out because even though it was negligence to send plaintiff into the car under the circumstances of the case, yet his own mis-judgment was responsible for his injury. The Court of Appeals fails to consider that plaintiff had to get out from under the racks because of the pain in his knee, and that his mis-judgment of distance was not an independent action which broke the chain of events but stemmed directly from defendant's negligence; (2) in rejecting the implicit finding of the jury on the issue of causation by treating the issue of causation as one of law rather than as one of fact.

3. The opinion of the Court of Appeals is obviously in conflict with decisions of this Court with respect to plaintiff's right to a jury determination on issues of causation, and clearly warrants the granting of this Petition for Certiorari and reversal of the judgment of the Court of Appeals. See, e. g.,

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409 (1944);

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740 (1946);

Coray v. So. Pac. Ry., 335 U. S. 520, 69 S. Ct. 275 (1949);

Penn v. Chi. & N. W. Ry. Co., 335 U. S. 849, 69 S. Ct. 79 (1948);

Stone v. New York, Chicago & St. Louis R. R., 344 U. S. 407, 73 S. Ct. 358 (1953).

4. The opinion of the Court of Appeals is clearly in conflict with decisions in other circuits with respect to the plaintiff's right to a jury determination of the issue of causation. See, e. g.,

Casey v. American Export Lines, 173 F. 2d 324 (C. A. 2, 1949);

Eglsaer v. Scandrett, 151 F. 2d 562 (C. C. A. 7, 1945);

Kurimsky, Admx. v. Unity Rys. Co., 357 Pa. 521 (1949).

PRAYER.

Petitioner prays that a Writ of Certiorari be granted by this Honorable Court directed to the Court of Appeals for the Third Circuit to the end that the Record in this case be reviewed by this Court, and that upon such review, the judgment of the Court of Appeals be reversed and that petitioner have such other relief as this Court may deem appropriate.

BRIEF.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In this case the Court of Appeals for the Third Circuit has reversed a judgment entered by the Trial Court on a jury verdict in an action for personal injuries brought under the Federal Employers' Liability Act. In so reversing judgment, the Court of Appeals concluded that there was negligence on the part of the defendant in sending the disabled plaintiff into the auto parts car to perform the kind of work which he had taken a lower rating and lower pay to avoid. But the Court said that this negligence did not proximately cause plaintiff's injuries. The sole proposition for the holding of the Court of Appeals in favor of defendant is epitomized in the following sentences of the Court's opinion, page 59:

> "In the instant case, even assuming that the defendant was negligent, there was no causal connection between its negligence and the injury to the plaintiff. We are of the opinion that as a matter of law the case should not have been submitted to the jury."
>
> * * * * * * * *
>
> "The crux of plaintiff's argument seems to be that the negligence of the defendant in sending the plaintiff to the car caused the accident, because he would not have misjudged the distance if he had not been there. But that does not constitute legal proximate cause."
>
> * * * * * * * *
>
> "In tracing the chain of causation beyond the plaintiff's own carelessness, the question must be: Why did he misjudge the distance? It is no answer legally or logically to say that he did so because he was sent into

the car. Recognizing this deficiency in his case, plaintiff contends that he misjudged the distance because he was forced to back out rather than go forward, on account of the pain in his knee. That would have constituted legal causation but unfortunately for the plaintiff the record is bare of any evidence that such was the case. It is true that the plaintiff testified that he made his exit because of the pain in his knee but he did not say that he was forced by his pain to crawl backward instead of forward as his counsel now argues."

A. The Court of Appeals erred in holding as a matter of law that the negligence of the defendant was not a cause of the accident.

It is respectfully submitted that the opinion of the Court of Appeals is flagrantly and patently in error in saying that the negligence of the defendant in sending plaintiff into the car knowing of his prior knee disability, did not cause the accident. When the plaintiff went into the restricted area of the auto parts car the defendant had actual knowledge that plaintiff would have to work in the manner that plaintiff testified he did or in some other way which would be inimical to his knee disability. Defendant also knew that he had taken a lower rating and a reduced salary to avoid this type of work. It is undenied that plaintiff's knee began to cramp so that he had to stand up to ease the pain. He couldn't do so under the racks where he was working. He did the next best thing, he backed out from under the racks.

It seemed to us that the jury would have a right to decide under all the evidence and the inferences reasonably deducible therefrom that there was cause and effect between defendant's negligence and plaintiff's injuries, even though

plaintiff may have contributed thereto by raising up his head sooner than he should have.

In other words, there was no break in the chain between the original cramping of his knee and his attempt to back out and relieve himself.

In *Eglsaer v. Scandrett*, supra, at 565, 567, the Court said

> "Perhaps the reconciliation of the earlier accepted, sometimes called the old-fashioned idea, of 'proximate cause' as the direct or efficient cause of the accident (as would be the district court's illustration of a shock from a defective electric bell ringer causing injuries and death) in cases where this statute applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. It provides that if the railroad's negligence *'in part'* results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation,' * * * if the injury or death resulted *'in part'* from defendants' negligence, there is liability.
>
> "The words 'in part' have enlarged the field or scope of proximate causes * * * in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident. Such a rule found some support in Wisconsin before the statute in question was passed. In Stefanowski v. Chain Belt Co., 129 Wis. 484, 109 N. W. 532, 533, 7 L. R. A. N. S., 955, the court said:

> " '* * * The proximate legal cause is that acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinarily prudent and intelligent person, have reasonable ground to expect at the moment of his act or default that an injury to some person might probably result therefrom. The act of one creating a peril may none the less be the legal cause of an injury to another because of intervening events which might or might not take place, proprovided such events are natural and probable, and provided the probability of injury might be reasonably anticipated. In both the Winchel v. Goodyear (126 Wis. 271, 105 N. W. 824), and Yess v. Chicago B. Co. (124 Wis. 406, 102 N. W. 932), cases the intervening event was a slipping of the person injured by reason of surrounding conditions, thus bringing himself within the peril which the defendant had created, and it was held that such events might, by a jury, be considered natural and probable under all the circumstances.' "

It appears to us as though the Court in the case at bar, were looking for a reason to find against the plaintiff and argues against itself in making these two diametrically opposite statements. At one point it says "if the plaintiff were forced to back out rather than go forward on account of the pain in the knee, that would have constituted legal causation, but, unfortunately for the plaintiff, the record is bare of any evidence that such was the case." Immediately thereafter, the Court says that "it is true he testified he made his exit because of the pain in his knee, but he did not say that

he was forced by his pain to crawl backward instead of forward, as counsel now argues."

We respectfully suggest that the jury under this testimony had a right to infer that the only practical way the plaintiff could have gotten out from under the racks toward the center of the car was by moving backwards. It appears to us that for a sixty-three year old man, not adept in acrobatics, to have come out forward rather than backwards would have accomplished quite a physical feat. However, again we say that this was a question for the jury to determine and not for the Court as a matter of law.

In the case of *Affolder v. New York, C. St. L. R. Co.*, 79 F. Supp. 365, affirmed in 339 U. S. 96, plaintiff brought an action against defendant railroad to recover for loss of a leg allegedly occasioned by violation of the "Safety Appliance Act" in that it was operating cars with couplers which did not automatically couple upon impact, as a result of which part of the cut of cars farthest from the engine commenced to move down-grade on a switch track. It was plaintiff's duty to stop such a movement. He was in a place of safety some distance from the track. The movement was on, and upon seeing the cars moving immediately started toward them at a rapid gait with the intention of going on the cars and setting the brake to stop the movement and avoid damage which might otherwise result. When he had reached a point near where he intended to board one of the cars, for some unexplained reason he slipped or tripped and fell; his right leg went over the rail; the car passed over it and he received injuries resulting in an amputation. The Court said at page 370:

> "(8, 9) The rules governing determination of proximate cause as set forth in Re-statement of the law of Torts, Vol. II, Secs. 430-443, are approved by the Eighth

Circuit in Chicago, M. St. P. & Pac. R. Co. v. Goldhammer, 79 F. 2d 272, loc. cit. 274 (writ of certiorari denied 56 S. Ct. 382, 80 L. Ed.):

"'" Sec. 435. Foreseeability of Harm or Manner of its Occurrence.

"'"If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable."

"'"Sec. 443. Dependent Intervening Force.

"'"An intervening act of a human being or animal which is a normal response to the stimulus of a situation created by the actor's negligent conduct, is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about.

"'"Comment:

"'"a. The rule stated in this Section applies not only to acts done by the person who is harmed or by a third person as a normal response to the situation created by the defendant's negligence, but also to acts of animals reacting thereto in a manner normal to them. * * *"

"'We think these statements clearly and correctly express the rules which should govern the rights of the parties to the present controversy.'

"There are many cases on the subject and while there seems to be no difficulty in determining the rule that should apply under circumstances such as presented by the present record, the difficulty is application of the rule to the case. The language of Mr. Justice Cardozo in Wagner v. International R. Co., 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1, is not without help:

"'Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their

effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. * * * The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had. * * * There must be unbroken continuity between the commission of the wrong and the effort to avert its consequences; * * * Continuity * * * is not broken by the exercise of volition. * * * whether plaintiff, in going to the rescue, as he did, was foolhardy or reasonable in the light of the emergency confronting him, were questions for the jury.'

* * * * * * * *

Page 372:

"'But it has long been settled that the chain of causation is not broken by an intervening act which is a normal reaction to the stimulus of a situation created by negligence, and such normal reaction has been held to include the instinct toward self-preservation, Scott v. Shepherd, 2 W. Bl. 892 (the lighted squib case), and the equally natural impulse to rush to others' assistance in emergency, Wagner v. International Railway Co. (Cardozo, C. J.), 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1 (the danger invites rescue doctrine). This rule of causation has been repeatedly recognized by this court. Sandri v. Bryam, 6 Cir. 30 F. 2d 784; 786; Erie Railroad Co. v. Caldwell, 6 Cir. 264 F. 947.'

"The point on which the cases turn on the proximate cause issue, as we understand them, is set forth as follows: 'to determine whether there was a continuous succession of events leading proximately from fault to injury, the test is not whether the plaintiff was acting in performance of his duty when injured, but whether his act was a normal response to the stimulus of a dangerous situation created by the fault.'"

In *Stone v. N. Y. C. & St. L. R. Co.*, supra, plaintiff brought an action under the Federal Employers' Liability Act for injuries sustained while in the employ of defendant railroad while removing track ties in a method different from other available methods and that additional men were available to aid in the removal of the ties. Petitioner stated that he was pulling as hard as he could and then his foreman said "if you can't pull any harder I will get somebody who will." Then petitioner gave a hard pull and hurt his back. The Court said, page 306:

> "We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. Wilkerson v. McCarthy, 336 U. S. 53, 61, 93 L. ed. 497, 504, 69 S. Ct. 413. The straw boss had additional men to put on the tongs. He also had three alternative methods for removing stubborn ties. This was not the first difficult tie encountered by the section crew in this stretch of track. The likelihod of injury to men pulling or lifting beyond their capacity is obvious. Whether the straw boss in light of the risks should have used another or different method to remove the tie or failing to do so was culpable is the issue. To us it appears to be a debatable issue on which fair-minded men would differ. Cf. Bailey v. Central Vermont R. Co., 319 U. S. 350, 353, 87 L. Ed. 1444, 1447, 63 S. Ct. 1062; Urie v. Thompson, 337 U. S. 163, 178, 93 L. Ed. 1282, 1296, 69 S. Ct. 1018, 11 A. L. R. 2d 252. The experience with stubborn ties, the alternative ways of removing them, the warning by petitioner that he had been pulling as hard as he could, the command of his superior to pull harder, the fact that more than two men were usually used in these circumstances—all these facts comprise the situation to be appraised in determining whether respondent was negligent. Those circumstances were for the trier of

facts to appraise. Cf. Blair v. Baltimore & O. R. Co., 323 U. S. 600, 604, 89 L. Ed. 490, 494, 65 S. Ct. 545. The fact that the employee, commanded to do the act that caused the injury, first protested does not place the risk of injury on him. Id. p. 605. We think there was evidence of a causal connection between the order of Stoughton to pull harder and petitioner's back injury. The fact that fair-minded men might likewise reach different conclusions on this branch of the case emphasizes the appropriateness of also leaving it to the jury. Ellis v. Union Pacific R. Co., 329 U. S. 649, 653, 91 L. ed. 574, 576, 67 S. Ct. 596; Coray v. Southern Pacific Co., 335 U. S. 520, 523, 93 L. Ed. 208, 210, 69 S. Ct. 275; Carter v. Atlantic & St. A. B. R. Co., 338 U. S. 430, 433, 94 L. Ed. 236, 240, 70 S. Ct. 226."

The Court in its opinion refuses to permit inferences to be taken from the evidence. The Court says "at most this was an implication that the lighting was poor, but an implication is not evidence and it is only from evidence that a jury is permitted to draw an inference."

Indeed, far more conjecture and speculation were necessary to establish negligence and causation in *Lavender v. Kurn*, supra, as well as in *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943). The latter involved the running down of an employee by an unlighted engine of the railroad and the defendant had contended that the cause of death was speculative or conjectural. So, too, in *Tennant v. Peoria & P. U. Ry. Co.*, supra, there was no direct evidence as to decedent's precise location when he was run over. The negligence of the railroad lay in its failure to ring a bell. Recovery was allowed although causal action by failure to ring the bell and decedent's death was even more speculative than in this case.

Likewise, in *Kurimsky, Admx. v. Unity Rys. Co.*, supra, recovery was allowed for the unobserved death of an em-

ployee; a jury finding of causation was sustained although the only basis for recovery lay in the speculative and conjectural hypothesis that the decedent may have been jerked off the train by a sudden stop and even though there was no direct evidence of any sort that he had been so jerked off the train. See also *Reynolds v. Texas & Pacific R. Co.*, 37 La. Ann. 694 (1885), and *Kirincich v. Standard Dredging Company*, 112 Fed. 2d 163 (C. C. A. 3, 1940). See also *Casey v. American Export Lines* (supra), where the Court said at page 327:

> "The defendant contends further that in any event there was no proof of causal relation between the charges of negligence and the death of Captain Casey. It must be conceded that in the absence of proof of such causal connection, the defendant's negligence is not actionable. St. Louis-San Francisco R. Co. v. Mills, 271 U. S. 344, 347, 46 S. Ct. 520, 70 L. Ed. 979; Chicago M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041. It must also be conceded that the precise moment of Capt. Casey's death is unknown and that even if the fire had been discovered promptly and if the inside fire-hose had been available under sufficient pressure without any delay, one cannot know with certainty that the captain's life would have been saved. Cf. DiNicola v. Pennsylvania R. Co., 2 Cir., 158 F. 2d 856, 857. But almost every verdict of a jury involves the element of speculation or conjecture to some extent."

Not only may causation be established despite conjecture and speculation, but *Coray v. So. Pac. Ry.* (supra), would seem to make it clear that under the Federal Employers' Liability Act even "substantial" cause is not required. It is enough that the injury or death results "in whole or in part" apparently in any degree from the negligence of the defendant. Even ignoring the other cumula-

tive evidence of negligence and causation, certainly the jury was justified in finding that the sending of plaintiff into the car to work set off a chain of events which was, at least, a contributing factor.

In *St. Louis Southwestern Ry. Co. v. Ferguson*, 182 F. 2d 949, 952 (1950) the defective condition of a coupler, in violation of the Safety Appliance Laws, had been an established fact, known to the plaintiff, prior to his going between the cars for the purpose of adjusting a coupler, when he sustained his injury. Obviously, the injury was not the proximate result of the defective coupler, within the meaning of ordinary tort law. However, the defective coupler was, nonetheless, in whole or in part, a contributing factor in producing the injury, by necessitating the presence of the plaintiff between the cars. There, too, as here, the carrier argued that there was no causal relationship, but merely a condition. Said the Court, in reply:

> "And as to causal relationship, the court in such a case equally has no right to direct a verdict on legalistic refinements between remote and immediate causation. Cf. Carter v. Atlanta & St. Andres Bay Ry. Co., supra, 338 U. S. 430, 70 S. Ct. at pages 228 and 229. The Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, et seq., which is the vehicle of suit for injury from a violation of a Safety Appliance Act, gives the employee a recovery right, even though the violation has been only 'in part' responsible for the injury. 45 U. S. C. A., Sec. 51. The causal question therefore too must be allowed to go to the jury in every case where there is probative evidence from which it would be rationally possible for any one to be persuaded that the violation has been 'a contributory proximate cause' of the injury. Coray v. Southern Pacific R. Co., 335 U. S. 520, 523, 69 S. Ct. 275, 277, 93 L. Ed. 208. The choice between the conflicting theories of causation, each of which is a rational possibility on some probative fact

or facts, is one which the jury alone is entitled to make. Ellis v. Union Pacific R. Co., 329 U. S. 649, 653, 67 S. Ct. 598, 600, 91 L. Ed. 572."

B. The Court of Appeals erred in assuming that the only evidence of negligence of the defendant was in sending plaintiff into the car.

The Court in its opinion says:

> "We conclude that as a matter of law the negligence of the defendant in sending plaintiff into the car, knowing of his knee injury, did not cause the accident and that there is no evidence in the case from which a jury could infer that the defendant was guilty of any other negligence."

The Court, in its opinion, disregards all of the testimony and inferences reasonably deducible therefrom regarding the conditions of lighting, the lack of instructions, the wearing of the goggles and the cap, all of which go to make up defendant's negligence, as well as sending him into the car to work under the circumstances.

The facts in the case at bar fall squarely within what the Supreme Court of the United States has said recently in the case of *Lavender v. Kurn*, supra. In that case, plaintiff's decedent was killed while throwing switches on a dark evening and decedent was found with a fractured skull from which he died. There were no eyewitnesses to the accident, and decedent could have been killed in one of two ways; either by being struck on the head by a mail hook from a passing train or by murder. The case was left with the jury to decide the cause of death and the jury decided that it was the mail hook. The Supreme Court, through Mr. Justice Murphy, said at page 652:

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.

* * * * * * * *

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

See also *Ellis v. Union Pacific R. Co.*, 329 U. S. 649, 653. In *Tennant v. Peoria & Pekin Union R. Co.*, supra, the Court through Mr. Justice Murphy, said at page 35:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored."

In *Wilkerson v. McCarthy*, 336 U. S. 53, the Court said at page 61:

"* * * But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances. And a jury should hold a master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances,' bearing in mind that the standard of care must be commensurate to the dangers of the business."

In discussing the cases in which certiorari was granted, the Court said at page 70:

"(1) The basis of liability has not been shifted from negligence to absolute liability.

"(2) The criterion governing the exercise of our discretion in granting or denying certiorari is not who

loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.

"(3) The historic role of the jury in performing that function, * * * is being restored in this important class of cases."

Ignoring the various elements of negligence previously discussed, and assuming, pro arguendo, that the only negligence of the defendant lay in the sending of plaintiff to work in a restricted area of the box car when defendant knew of his disability, nevertheless, the defendant set off a chain of causation which eventually concluded in plaintiff's injury. There is no question, under the evidence, that plaintiff began to move out from under the racks because of the pain in his knee and there is no evidence in the record that the pain had ever ceased before he was able to stand up and therefore the reason which motivated plaintiff to move out still existed when the accident occurred and could have been translated to that point by the jury and probably was.

We do not contend that the mere sending of plaintiff into the car was the cause of the accident, but we do contend that sending plaintiff into the car and the cramping of plaintiff's knee which caused plaintiff to attempt to back out is what was responsible for the plaintiff striking his head against the end of the rack.

C. The Court of Appeals erred in declaring that plaintiff's contributory negligence was a bar to this action.

The Court, in its opinion, says:

"In tracing the chain of causation beyond the plaintiff's own carelessness the question must be: Why did he misjudge the distance."

This is a fair example of a court deciding that a plaintiff under Federal Employers' Liability Act cannot recover where he is guilty of contributory negligence, even though the defendant is negligent, contrary to the decisions of the United States Supreme Court.

In *Tiller v. Atlantic Coast Line R. Co.*, supra, the Court said at page 72:

> "An employee cannot be charged with contributory negligence simply because he 'assumed the risk'; the inquiry is did his conduct depart from that of a reasonably prudent employee in his situation? As Mr. Justice Holmes admonished us in the Schlemmer case 'unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name.' Ibid. That case was decided before the Federal Employers Liability Act was in force."

D. The judgment of the Court of Appeals deprives plaintiff of the right to trial by jury.

The Court has repeatedly held that the right to trial by jury in Federal Employers' Liability cases is a basic and fundamental feature of plaintiff's remedy.

Bailey v. Central Vermont Ry., 319 U. S. 350, 63 S. Ct. 1062 (1943);
Tennant v. Peoria & P. U. Ry. Co. (supra);
Lavender v. Kurn (supra).

The right to jury trial with respect to issues of causation is as essential an ingredient of the plaintiff's remedy as the right to a jury determination of an issue of negligence. So this Court has indicated on several occasions. See

Tennant v. Peoria & P. U. Ry. Co., supra;
Coray v. So. Pac. Ry., supra;

St. Louis Southwestern Ry Co. v. Ferguson, supra; *Eglsaer v. Scandrett*, supra.

The vast majority of the pronouncements of this Court as to the right to a jury determination of the issues have dealt with problems of negligence. It is respectfully submitted that the Court should take this opportunity to remove all doubt which may persist with respect to a similar right to a jury determination of issues of causation.

Cf. *Casey v. American Export Lines* (supra).

In *Blair v. B. & O. R. Co.*, (1944), 323 U. S. 600, 602, 604, the Court said:

> "To deprive railroad 'workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.' "

CONCLUSIONS.

It must be apparent that the Court of Appeals erred in that:

(1) It completely ignored a number of other substantial facts as to which causation is indisputable, or, which at least, presented clear issues for the jury;

(2) It has by judicial fiat decided that contributory negligence on the part of the plaintiff is a bar to his action under the Federal Employers' Liability Act, which is contrary to the express mandate of this Court;

(3) It has ignored the fact that defendant, due to its negligence, was at least in part responsible for the plaintiff's injuries;

(4) It erred in depriving the plaintiff of a right to jury trial on issues of causation, in violation of prior rulings of this Court and in contradiction of the rulings of other Courts of Appeal and of the Supreme Court of Pennsylvania.

A Writ of Certiorari should be granted in this case; the judgment of the Court of Appeals should be reversed and the judgment for the plaintiff reinstated.

Respectfully submitted,

JOSEPH G. FELDMAN,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 827.

HARRY F. GILL,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the district court (R. 45a) is unreported. The opinion of the Court of Appeals for the Third Circuit (R. 56) is reported at 201 F. 2d 718.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. A. § 1254).

QUESTION PRESENTED.

Whether the Court of Appeals erred in directing the entry of judgment for the respondent on the ground that, on the particular facts of this case, the petitioner had failed to show any negligence on the part of the respondent that contributed to petitioner's injury.

STATUTE INVOLVED.

The statute involved is Section 1 of the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, 35 Stat. 65, as amended by Act of August 11, 1939, c. 685, 53 Stat. 1404; 45 U. S. C. A. § 51).

STATEMENT.

Petitioner was injured on October 4, 1949 when working in one of the respondent's box cars, each end of which was equipped with metal racks (R. 22a) that were about four and one-half feet above the floor of the car (R. 12a). The facts of the accident are not disputed. They were related by the petitioner himself and respondent accepts all of them as true.

Petitioner entered the car pursuant to instructions from his foreman to assist another man who was already working in the car at a point about eight and one-half feet under one of the racks (R. 12a-13a). Petitioner crawled under the rack and, after working there about ten minutes, his left knee, which he had injured the previous year (R. 8a), became cramped and he undertook to back out (R. 14a) to the part of the car between the doors which was free of the racks (R. 23a) and where he could stand up and stretch his leg. He had backed a distance which he estimated to be about eight feet and when he thought that he was clear of the racks, although in fact he was not, he raised his head and bumped it on the rack (R. 14a-15a). The only reason that he gave for his accident was that he misjudged his position and raised his head when he mistakenly thought he was clear of the racks (R. 24a-25a).

Although petitioner had not worked in such a car before, he was familiar with its construction and equipment, having seen such cars in the shop on prior occasions (R. 20a). He said that he had received no instructions other than that he was to work with a man named Pappy (R. 10a-11a, 13a), but there was no evidence that the absence of further instructions had anything to do with the accident. He was an experienced man (R. 6a) and he knew and could see what he was to do as a helper on the job to which he had been assigned (R. 12a, 13a). Petitioner's movements within the car were entirely voluntary and unaffected by anything that he had been told or not told to do. He also said that he had

not seen any artificial light in the car (R. 13a). However, it was daytime, the center doors of the car were open and there was no evidence of a need for artificial light. Petitioner could readily see without any (R. 12a, 13a). He was wearing a cap and goggles (R. 13a-14a), but there was no evidence that either of these interfered with his vision or had anything whatever to do with the accident.

At the conclusion of the petitioner's case respondent moved for a directed verdict (R. 44a) on the grounds that there was no evidence of any negligence on the part of the respondent, no evidence that any negligence on the part of the respondent caused or contributed to petitioner's injury and that the sole cause of petitioner's injury was his own carelessness. The respondent's motion was denied and the trial judge submitted the case to the jury, which returned a verdict for the petitioner in the sum of $15,000. Respondent's motion for judgment in accordance with its motion for a directed verdict was denied by the trial judge, but being of the opinion that petitioner's negligence was a 50% contributing factor to the injury sustained (R. 49a) the Court entered an order granting a new trial unless the petitioner remitted all damages above the sum of $7,500.00 (R. 50a). Such a remittitur was filed and judgment was entered against the respondent for $7,500.00. It was this judgment that the Court of Appeals reversed on the ground that "even assuming that the defendant was negligent, there was no causal connection between its negligence and the injury to the plaintiff" (R. 59).

ARGUMENT.

The petition shows on its face that the question presented does not meet the requirements that this court has laid down for granting a writ of certiorari. *Supreme Court Rule 38(5)*. The case involves no general principle that requires or deserves review by this Court and the ultimate question relates merely to the application of accepted principles to the particular facts here involved.

In any event the decision below was correct. The petitioner's proof was insufficient to justify submission to the jury of the issue of respondent's negligence and, even if negligence should be assumed, as it was by the Court of Appeals for the purpose of its ultimate decision (R. 59), there was no evidence to sustain a finding by the jury that any act or omission of the respondent contributed to the petitioner's injury.

I. This Case Presents No Question That Requires or Deserves Review by This Court.

The only question presented in this case is whether the Court of Appeals correctly held, on the admitted facts, that the petitioner had failed to make any showing of negligence on the part of the respondent which had contributed to the petitioner's injury. The decision of this question turns on the particular facts involved. No general principle is in controversy and the disputed issue relates only to the application of well settled rules to the circumstances of this particular case. The decisions of this Court under the Federal Employers' Liability Act disclose a consistent pattern of principle, which is not disputed in this case. In cases in which there is conflicting probative evidence, or in which conflicting reasonable inferences may be drawn from probative evidence, this Court has held that the conflict must be resolved by a jury. On the other hand if there is no conflict in the evidence and no probative evidence from which inferences favorable to the plaintiff can be drawn, this

Court has consistently either denied certiorari or affirmed the decision below. *Roberts v. Alabama Great Southern Railroad Co.*, 340 U. S. 829 (1950); *Emmick v. Baltimore & Ohio Railroad Co.*, 340 U. S. 831 (1950); *Roberts v. Missouri-Kansas-Texas Railroad Co.*, 340 U. S. 832 (1950); *Gentry v. Seaboard Air Line Railroad Co.*, 340 U. S. 853 (1950); *Reynolds v. Atlantic Coast Line R. R. Co.*, 336 U. S. 207 (1949); *Scocozza v. Erie R. R.*, 171 F. 2d 745 (2 Cir. 1949) cert. den. 337 U. S. 907 (1949); and see the appendix to the concurring opinion of Mr. Justice Douglas in *Wilkerson v. McCarthy*, 336 U. S. 53, 72 (1949).

The case at bar falls into the category of cases in which both evidence and inferences from evidence supporting the charge of negligence are totally lacking. All of the evidence was offered by the petitioner. Everything said by the petitioner about the accident and why it happened—and there was no evidence on this subject from any other source—leads directly to one conclusion and establishes unequivocally that the exclusive cause of petitioner's injury was an error of judgment on his part, a mistaken belief as to his position with reference to fixed objects around him, which were harmless in themselves, a free and wholly voluntary movement made without first looking to see if it could be made without harm to himself. There is no conflict in the evidence and consequently nothing in the case which calls for the services of a jury to determine either the facts or the inferences to be drawn therefrom. The evidence therefore did not meet the initial judicial test which is a basic and integral part of the jury trial system.

The decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter and it does not decide any important question of Federal law which has not been but should be settled by this Court. On the contrary the decision is expressly based upon and faithfully follows the decision in *Brady v. Southern Railway Co.*, 320 U. S. 476 (1943) and other simi-

lar decisions of this Court (R. 58, 59). None of the other grounds stated in Rule 38 as the basis for granting a writ of certiorari is present. Thus the petition should be denied.

II. There Was No Evidence to Sustain a Finding That Any Negligence of Respondent Contributed to the Injury.

It is clear from the petitioner's own testimony, which was not controverted in any way, that the sole cause of his injury was his mistaken belief that, when he raised his head, he had moved far enough to clear the rack under which he was working. The only explanation of the accident that the petitioner himself gave was that when he thought he was clear of the rack he raised his head and bumped it because he had misjudged his position (R. 14a, 15a, 24a, 25a).[1] This was the same explanation that he had

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1. His complete statements on the cause of his accident were as follows:

> "A. Well, the knee was cramped from being in there the way I was, in the position I was in; I started to back out and I thought I was clear of the racks and I raised my head up against the rack." (R. 14a)
>
> • • •
>
> "Q. Then what did you do when you thought you were clear?
>
> A. I raised up and I hit a hatch on one of the racks and I put a hole in my head here (indicating)." (R. 15a)
>
> • • •
>
> "Q. As you said, you started to back out and you thought you were clear and stood up and bumped your head?
>
> A. Yes, sir.
>
> Q. And that is the way the accident happened?
>
> A. Sir?

given originally in a signed statement describing how the accident happened, in which he also said, in answer to a question asking how the accident could have been prevented, that he had "just misjudged where this channel was".[2]

In *Ellis v. Union Pacific Rwy. Co.*, 329 U. S. 649 (1947) this Court said, p. 653:

> "The (Federal Employers' Liability) Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in

---

Q. And that is the way the accident happened?
A. Yes, sir." (R. 24a)

* * *

"Q. The cause of it was that you simply misjudged where you were?
A. Well, I was trying to get out of the car, and I come out and I thought I was clear of the racks, and I raised my head up and hit my head.
Q. In other words, you misjudged your position?
A. Yes." (R. 24a-25a)

2. What he said about the accident in his signed statement was as follows:

"Q. State just what happened?
A. I was working down on one knee in a stooped position applying this floor strip. My left knee was a little stiff and I backed a little to stand in an upright position and I thought I was clear of this channel above me but when I raised up I struck the top of my head against the channel.
Q. Did you know this channel was above you?
A. I knew it was there but I thought I had backed clear of it." (R. 43a)

* * *

"Q. How do you think this accident could have been prevented?
A. I just mis-judged where this channel was." (R. 43a)

part' the cause of the injury. 45 U. S. C. § 51; *Brady v. Southern R. Co.*, 320 U. S. 476, 484."[3]

It is clear from the petitioner's own testimony that he has not met the test of liability under the Federal Employers' Liability Act. He knew that the rack was above his head (R. 22a, 43a) and that if he raised his head before he had moved clear of the rack he would bump it. That he misjudged his position was no fault of the respondent. The respondent had presented a static, non-dangerous work area within which the petitioner was free to move with perfect safety. He had four and one-half feet of head room, which is much greater than that existing in many working places. There was nothing that the respondent did or failed to do that caused or required petitioner to raise his head when he was still under the rack. When the petitioner prematurely raised his head, he did so freely and entirely of his own volition and not because of anything done or omitted to be done by the respondent, or even because of the condition of the petitioner's knee. As he said himself, he did it solely because he misjudged his position, thinking that he was in the clear when he was not.

Although petitioner now emphasizes the condition of his knee and seeks to charge the respondent with negligence because it allowed him to work in a place where he could not stand upright, the accident was not caused by the condition of his knee. Not only did petitioner think so little about his knee that he made no mention of it on the day of the accident (R. 20a), but precisely the same situation would have existed if the petitioner had been backing out from under the rack for the purpose of going to lunch, to

3. To the same effect are *Moore v. Chesapeake & O. R. Co.*, 340 U. S. 573, 575 (1951); *Reynolds v. Atlantic Coast Line R. Co.*, 336 U. S. 207 (1949); *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67 (1943); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 32 (1944); *O'Donnell v. Elgin, J. & E. R.*, 338 U. S. 384, 390 (1949).

get some tools or other materials, or even simply to go home. His knee did not cause him to raise his head too soon, it merely created a reason why at that particular moment, rather than at some other time, the petitioner undertook to move out from under the rack. Thus petitioner's restricted position in the car under the rack and the stiffness of his knee were mere conditions which provided an opportunity for him to injure himself at the particular instant and in the particular manner that he did, but did not make either of them take the place of his own voluntary act as the sole cause of his injury. They were but the background elements which are described in *C. J. S. Negligence, § 104,* as *"merely causing a condition providing an opportunity for other causal agencies to act."* (Emphasis supplied.) Such conditions do not establish liability.

This principle is well recognized and has been consistently applied in the Federal Courts. *Reetz v. Chicago & E. R. Co.*, 46 F. 2d 50, 51(1) (6 Cir. 1931); *Schmidt v. U. S.*, 179 F. 2d 724, 725-6 (10 Cir. 1950); *Reynolds v. Atlantic Coast Line R. Co.*, 196 F. 2d 643, 646 (5 Cir. 1952); *Reynolds v. Atlantic Coast Line R. Co.*, 336 U. S. 207 (1949). Thus in *Wolfe v. Henwood*, 162 F. 2d 998 (8 Cir. 1947), cert. den. 332 U. S. 773 (1947) a railroad section hand used gasoline soaked waste to remove fuel oil from his clothing which had become saturated therewith while he was removing oil and water from catch basins on defendant's property. In disposing of the waste by burning he also set fire to his clothing, which caused burns resulting in his death. Suit was brought under the Federal Employers' Liability Act charging that the defendant was negligent in failing to furnish a pump to clean the catch basins rather than requiring the men to do it manually. In denying liability it was held, p. 1001, that the employee's "own affirmative and voluntary act" in burning the gasoline soaked waste was the "sole cause of the accident."

III. Petitioner's Theories of Liability Either Are Not Supported by the Evidence or Are in Conflict Therewith.

In railroads and other modern industry work must often be done in locations which lack sufficient head room to enable the worker to stand upright. Necessarily, a worker performing his duties in such a place must move from that location to one with more head room before he stands fully erect. Petitioner's argument would make an employer subject to liability every time an employee worked in a location without sufficient head room to permit the work to be performed while standing upright. Of course, it can be anticipated that the employee will eventually move from the restricted location to one with greater head room, whether the employee leaves the restricted place because he has finished the job there, because it is time for lunch, or because he wishes to stretch his muscles. Under the petitioner's theory, any time an employee who is working in such a restricted place starts to leave it, mistakenly judges that he has reached a location where he can stand upright, and consequently bumps his head, his employer would have to pay him for the consequences of his misjudgment.

It is submitted that there is no decision which supports any such theory, and certainly none of those cited by the petitioner does.

In this case there was no emergency, no danger, no cry of distress, no rescue (cf. petitioner's brief pp. 14-15). Nothing except the petitioner's own mistake as to his position was the cause of the accident. And in view of the clear and unequivocal testimony of the petitioner himself there is no basis for speculation upon other possible causes of the accident. The cases cited by petitioner, in which the death of the employee involved and the absence of other witnesses left the cause of the accident uncertain and subject to a certain amount of speculation and conjecture, can have no application where, as here, the injured employee described precisely what happened. Thus the petitioner may

not properly suggest, as he now does on page 20 of his brief, that the lighting conditions, the lack of instructions, the wearing of goggles and a cap might have had something to do with negligence which might have been the proximate cause of the accident, since none of those factors was referred to by the petitioner at the trial as having had anything whatever to do with his bumping his head. Although petitioner now suggests that the lighting was poor (petitioner's brief p. 6) and criticises the court below for saying that there was at most an "implication" that the lighting was poor (petitioner's brief p. 17) it is clear from the record that there was no evidence whatever either that the lighting was poor or that there was any basis even for an implication to that effect. All the petitioner testified to on the subject was that the car was illuminated by the light from the doors and that he did not see "any lamp light of any sort" (R. 13a). There was not a word to suggest that any artificial light was needed or that the lighting was in any way insufficient; and, on the contrary, whenever the petitioner was testifying about what he could see, there was never any intimation that the light was not fully adequate for all purposes (R. 12a-13a).

Similarly the lack of more specific instructions was totally immaterial since petitioner needed no instructions to tell him that the racks were four and one-half feet high and that if he raised his head while under them he would bump it. Petitioner knew that he was to help the workman already in the car (R. 11a), he saw what he was doing before he started helping (R. 12a, 13a) and it was obvious that if any further instructions were needed they would come from the man whom he was to help as the work progressed.

Petitioner's present reference to the goggles and the cap as elements of negligence is still more obscure, since at no time did he testify that they had any limiting effect on his vision or that they contributed in any way to his mistaken notion that he was clear of the rack when he was not. A cap is a common article of clothing and the

goggles were furnished as a safety measure, and to say that either of those had anything to do with the accident or that they constituted evidence of negligence is merely the invention of a theory of liability for which there is no supporting evidence in the record.

Nor is there anything in the record to suggest that petitioner's injury was caused or contributed to by the fact that he backed out from under the rack instead of crawling out forward. Acrobatics were not required of the petitioner. It was his choice and his alone and the result of the exercise of his own free will, unaffected by anything done by the respondent or even by the condition of the petitioner's knee, that led him to back out rather than crawl out forward. Thus petitioner's criticism of the Court below in pointing out that the petitioner was not "forced to back out" (petitioner's brief pp. 12-13) is quite unjustified by anything he said at the trial. It was to relieve his knee that he moved at all, but there is nothing in the record to suggest that it was his knee that required him to move backward rather than forward or prevented him from turning around if he had wanted to. Even more fundamental is the lack of any evidence that remotely suggests that it was going backward rather than forward that caused him to misjudge his position and raise his head while still under the rack.

Where the evidence showing how the accident happened is unequivocal, direct and uncontradicted, there is no room for speculation or inference that the accident might have resulted from some other cause which, if it had existed, might have constituted negligence on the part of the defendant. Thus in *Wolfe v. Henwood,* 162 F. 2d 998 (8 Cir. 1947), *supra,* p. 9, in rejecting suppositions contrary to the proven facts, the Court said, p. 1001(▲), "for here, unlike the situation in the Lavender and Ellis cases, there is positive proof that points unmistakably to negligence of deceased as the sole cause of the accident."

In *Southern Ry. Co. v. Mays,* 192 Va. 68, 76, 63 S. E. 2d 720, 725 (1951), cert. den. 342 U. S. 836 (1951), the defendant's employee was run over and killed by a locomotive. The only evidence of how the accident happened came from the engineman, who testified that he saw the deceased jump toward the engine when it was close upon him. Recovery was denied on the ground that the evidence "definitely points out and conclusively establishes that decedent's reckless act was the cause and the only cause of his death."

Similarly in *Moore v. Chesapeake & O. R. R. Co.,* 340 U. S. 573 (1951), the plaintiff sought to recover on the theory that the deceased brakeman was thrown from the tender of a locomotive due to a sudden and unexpected stop, although the only evidence showing how the accident happened was that the deceased had first fallen from the tender and that thereafter the engineman made an emergency stop in an attempt to avoid injuring him. In denying liability this Court said, p. 578, "Speculation cannot supply the place of proof."

Although petitioner disclaims any intention to assert that "the mere sending of plaintiff into the car was the cause of the accident" (petitioner's brief p. 33) that is all that the petitioner's argument amounts to. Petitioner now contends that merely because he had a stiff knee which could reasonably be expected to require his withdrawal from a cramped position sooner than a workman whose knee had not been injured, his employer must pay him for the consequences of his own mistake in bumping his head on a rack which he knew was there but whose position he misjudged.

Were such a doctrine ever to be accepted no person with a physical infirmity could ever safely be employed, since any mistake on his part which resulted in his injury could be transformed into negligence on the part of his employer in allowing him to work at all.

IV. Contributory Negligence Is Not Involved.

At pp. 23-24 of his brief petitioner misinterprets the opinion of the court below and charges that it held "that plaintiff's contributory negligence was a bar to this action". It is obvious from reading the opinion of the Court of Appeals that it did no such thing. The quotation from the opinion appearing on p. 23 of petitioner's brief (R. 60) was merely a rhetorical question posed to determine whether or not anything done by the respondent caused petitioner to "misjudge the distance". After analyzing all the evidence the court below came to the inevitable conclusion that there was nothing "beyond the plaintiff's own carelessness" which caused him to raise his head too soon, and therefore properly held that under the decisions of this Court there could be no recovery.

Assumption of risk obviously had nothing to do with the case and was not even mentioned by the court below. The decision in this case was merely a reaffirmation of the view that the court expressed in the case of *Eckenrode v. P. R. R. Co.*, 164 F. 2d 996, 1000 (3 Cir. 1947), aff'd 335 U. S. 329 (1948) in which it said:

> "But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend there is negligence when it does not exist. It does not exist in this case".

V. Petitioner Was Not Improperly Deprived of a Jury Trial.

None of the cases cited by petitioner on pp. 24-25 of his brief support the proposition that on such evidence as is contained in this record he was entitled to have his case submitted to a jury. It is a fundamental concept of our jury system that before a proponent is entitled to have his case submitted to a jury he must first present probative facts

to support the conclusion he seeks. Thus in *Lavender v. Kurn*, 327 U. S. 645, 653 (1946) this Court made it clear that there must be "an evidentiary basis for the jury's verdict" and "when there is a complete absence of probative facts to support the conclusion reached" it is "reversible error" to let a jury verdict stand. Mr. Justice Frankfurter gave expression to the rule in his concurring opinion in *Wilkerson v. McCarthy*, 336 U. S. 53, 64-5 as follows:

> "It is an important element of trial by jury which puts upon the judge the exacting duty of determining whether there is solid evidence on which a jury's verdict could be fairly based."

In *Brady v. Southern Ry. Co.*, 320 U. S. 476 (1943) this Court said at page 479:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. *Western & Atlantic R. Co. v. Hughes, supra; Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 524. Cf. *Gunning v. Cooley*, 281 U. S. 90, 94; *Commissioners v. Clark*, 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

As Professor Wigmore said in IX Wigmore on Evidence, § 2487:

> "Apart from the distinction of functions between judge and jury, these rules need have had no existence.

They owe their existence chiefly to the historic and unquestioned control of the judge over the jury, and to the partial and dependent position of the jury as a member of the tribunal whose functions come into play only within certain limits.

"The treatment of the situation, and the operation of the rules, can best be comprehended by keeping this consideration in mind, namely, that the *opportunity to decide finally upon the evidential material that may be offered does not fall to the jury as a matter of course;* that each party must first with his evidence pass the gauntlet of the judge; and that the judge, as a part of his function in administering the law, is to keep the jury within the bounds of reasonable action. In short, in order to get to the jury on the issue, and bring into play the other burden of proof (in the sense of the risk of non-persuasion of the jury), both parties alike *must first satisfy the judge that they have a quantity of evidence fit to be considered* by the jury, and to form a reasonable basis for the verdict. This duty of satisfying the judge is peculiar in its operation, because if it is not fulfilled, the party in default loses, by order of the judge, and the jury is not given an opportunity to debate and form conclusions as if the issue were open to them." (Emphasis by Professor Wigmore.)

VI. Conclusion.

The respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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